



REPUBLIC OF KENYA



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**Onkoba v Masongo & another (Civil Appeal E009 of 2024)
[2025] KEHC 3800 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E009 OF 2024
DKN MAGARE, J
MARCH 10, 2025**

BETWEEN

REBECCA KERUBO ONKOBA APPELLANT

AND

BIVON GETANGE MASONGO 1ST RESPONDENT

DENNIS MAYAKA NYAKUNDI 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. P.K. Mutai (PM) given on 15.11.2023 in Kisii CMCC No. 637 of 2019. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:
 - a. Liability 80:20% in favour of the Respondent against the Appellant.
 - b. General damages Ksh. 350,000/=
 - c. Special damages Ksh. 8,370/=
 - d. Costs of the suit
2. The Appellants were aggrieved and filed a 5-paragraph Memorandum of Appeal on quantum. They set out the following grounds of appeal:
 - a. That the learned trial magistrate misdirected himself in making an award of general damages in the sum of Kshs.350,000/=, which is an excessive sum in terms of circumstances.
 - b. That the learned trial magistrate misdirected himself in law by making an award of both general and special damages which were not proved to the requisite standard in law, which awards were equally excessive.



- c. That the learned trial magistrate misapprehended the principles applicable in computation of damages, thus occasioning a miscarriage of justice.
 - d. That the learned trial magistrate misdirected himself in fact and in law in failing to consider the Appellant's submissions and authorities in support thereof.
 - e. That the learned trial magistrate erred in law and in fact by failing to evaluate the evidence on record, thus reaching an erroneous decision.
3. The memorandum of appeal is contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides as following: -
- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say about compliance with Rule 86 (now Rule 88) of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR:-

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

5. The issue is only one, whether the damages awarded were so inordinately high as to amount to an erroneous estimate of damages. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. It behooves counsel to have a precise and concise memorandum of appeal that is not unseemly.

Pleadings

6. Being an appeal on quantum, going to the pleadings related to liability is unnecessary. The Respondent pleaded that he suffered the following injuries:
- a. Bruises on the face



- b. Bruises on the right upper limb
- c. Bruises on the left upper limb
- d. Bruises on the left knee
- e. Bruises on the right knee
- f. Chest contusion

Evidence

- 7. Dr. Morebu Momanyi testified and produced a medical report of bruises on the face, bruises on the right upper limb, bruises on the left upper limb, bruises on the left knee, bruises on the right knee, and chest contusion. The injuries left ugly scars. He produced medical treatment notes, appointments, treatment notes, P3 form, and medical reports and receipts.
- 8. The Respondent testified as PW2. He adopted his statement, enumerating injuries. He stated he was injured on both legs, face and hands.

Submissions

- 9. The Appellant relied on the cases of the Appellant and submitted that an award of Ksh.100,000/= would suffice. They relied on 2019 and 2022 authorities awarding 150,000/= and 100,000/=.
- 10. The Respondent stated that the amount awarded was sufficient. They relied on the case of Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd [2006] eKLR. In that case, the claimant sustained a deep cut on the face, multiple pains in both legs, arms, and both shoulders, an abrasion on the right lower chin, backache and chest pain, and a painful right shoulder.

Analysis

- 11. This being a first appeal, this court must evaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

- 12. The duty of the first appellate court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the judges in their usual gusto, held as follows;-

“... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”



13. The Court is to remember that it has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. General damages are damages at large, and the Court does its best to reach an award reflecting the gravity and nature of injuries. In *Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D.S. Majanja held as doth:

“General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”

15. The first appellate court is under duty to have regard to award in similar cases and not foreign awards. In the case of *Butler vs Butler*, Civil Appeal No. 43 of 1983 (1984), KLR Keller JA, it was stated as follows in regard to the award of damages.

“This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. *Kimothia v Bhamra Tyre Retreaders*[1971]EA(CA-K); *Tayab and Ahmed Yakub & Sons v Anna May Kinanu* Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.

The fall in the value of money generally and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. *Bhogal v Burbridge* [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one’s own assessment, it is not necessarily wrong. *H West & Sons Ltd v Shephard* [1964] AC 326, Lord Morris of Borth-Y-Gest; also *Hancox JA in Tayab* (1983 KLR, 114).

16. There has to be a relationship between the award and the nature of injuries suffered. They cannot be based on arbitrary figures, conjectures, or surmises. In *HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another* [supra], the court stated:

In cases of this kind, as the one being challenged by the appellant, what would be the general expectations of the trial court? There is obviously a relationship between the award and the nature of



injuries suffered. The burden upon the claimant is in justifying the compensation on the threshold outlined in *Cornilliac v St. Louis* [1965] 7 WIR 491. This is simply for the trial court to take into account:

- (a) The nature and extent of the injuries sustained.
- (b) The nature and gravity of the resulting physical disability.
- (c) The pain and suffering which had to be endured.
- (d) The loss of amenities suffered; and
- (e) The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

17. A claimant to the accident might get well and restore to his or her original health status before the accident. Sometimes that is not the case in most instances, as stated in the case of *Butt v Khan* {1981} KLR 470 and *Kitavi v Coastal Bottlers Ltd* {1985} KLR 470).

“Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.”

18. In the case of *Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.

19. There is only one issue for determination, that is, whether an award of Kshs. 350,000/= was inordinately excessive as to amount to an erroneous estimate of damages. The Respondent was left, reportedly, with permanent, ugly scars. However, though reportedly permanent, it is not plausible that scars can be formed within a week of the injury. The degree of permanency was not given. Scabs may have formed, but it is not plausible that there were ugly scars.

20. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in *Shah and Another vs. Shah and Others* [2003] 1 EA 290:

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”



21. However, a medical report will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. The Court of Appeal, on its part in *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139* held that:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

22. The evidence of a medical report, as is in this case, must be considered along with all other available evidence. A court would be perfectly entitled to do so if there is a proper and cogent basis for rejecting the expert opinion. In *Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29*, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of *Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995*. There the Court said with regard to the evidence of experts:-

“The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- “Because this is the evidence of an expert, I believe it.”

23. This court will independently reevaluate an expert report herein. The Respondent suffered soft tissue injuries, which the doctor classified as harm in the P3. Harm means bodily hurt, whether permanent or temporary. If there is any disabling, then it rises to maim. Therefore, the allegation of ugly scars has no basis in this connection. To that extent, the medical report does not accord with other evidence on record, especially the P3, filled by the same expert. The examination was on 23.7.2019 while the injury was on 17.7.2019. There is thus no basis to allude to ugly scars, barely 4 days after the accident.

24. The court is aware that the Court of Appeal succinctly pronounced these principles in *Kemfro Africa Ltd Vs. Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27* as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

25. Turning to similar awards, the court in *Francis Omari Ogaro v JAO (minor suing through next friend and father G.O.D [2021] eKLR)*, in a decision of 28.10.2021, stated that a sum of Kshs. 180,000/= will be sufficient for far more serious soft tissue injuries.



26. In *Elizabeth Wamboi Gichoni v Benard Ouma Owuor* [2019] eKLR, on 2/12/2019, the court found an award of Kshs. 300,000/= excessive and reduced to 175,000/= for lesser soft tissue injuries.
27. In the case of *Ufrah Motors Bazaar & another v Kibe (Civil Appeal 39 of 2021)* [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment), this court confirmed an award of Ksh 220,000/- for right shoulder joint, soft tissue injuries of the chest, soft tissue injuries of the back, deep lacerations on the right-hand arm, forearm and hand, soft tissue injuries of the knee joints and soft tissue injuries of the right hip joint.
28. Noting the inflation, passage of time, and the nature of the injuries, the award of Kshs. 350,000/= is inordinately high as it amounts to an erroneous estimate of damages. The injuries suffered attract a range of Ksh. 200,000/= - 250,000/=. Given the extent and severity, a sum of Ksh. 250,000/= will suffice. An award of Ksh 350,000/= is inordinately excessive and is set aside. In lieu thereof, an award of general damages of Ksh. 250,000/= is granted.

Costs

29. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
 - (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
30. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.
31. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such



discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– those costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

32. In the end, the Appellant was partially successful. The best order is for each party to bear its own costs.

Determination

33. The upshot of the foregoing is that I make the following orders: -

- a. The appeal is allowed. The award of Ksh. 350,000/= is set aside. In lieu thereof, I enter judgment on general damages for Ksh. 250,000/= subject to liability. The general damages will attract interest from the date of judgment in the lower court.
- b. Each party to bear its costs.
- c. The 2nd Respondent is struck out.
- d. 30 days stay of execution.
- e. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipyegon for the Appellant

Ms. Chepkorir for the 1st Respondent

Court Assistant – Michael

